SUBJECT INDEX

	Page
STATEMENT OF INTEREST	1
ARGUMENT	3
I. INTRODUCTION	3
II. NLRA PREEMPTION	4
III. CONSTITUTIONAL PROTECTION	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

LIST OF AUTHORITIES

CASES

	Page
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957)	5
Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, D.C. Cir. 1970, 429 F.2d 206, 1970	8
Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963)	5
International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970)	5
McCulloch v. Sociedad Nacional, Etc., 372 U.S. 10 (1963)	5
Police Department of the City of Chicago v. Mosely, 408 U.S. 92, 99, 1972	7
Windward Shipping (London), Ltd., et al v. American Radio Association, AFL-CIO, et al, ____U.S.____, 39 L.Ed.2d 195 (1974)	2, 4

UNITED STATES CONSTITUTION

First Amendment	4, 7
Fourteenth Amendment	4

UNITED STATES STATUTES

29 U.S.C. 152, 157, 158	3

TEXT

Wright and Miller, Federal Practice and Procedure, Vol. 11, Sec. 2962	8

MISCELLANEOUS

Waterborne Commerce of the United States, Calendar Year 1972, Department of the Army, Corps of Engineers (1972)	3

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO ET AL., *Petitioners,*

v.

MOBILE STEAMSHIP ASSOCIATION, INC., AND ROBERT E. MALONE, *Respondents.*

ON CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AS AMICI CURIAE OF:
West Gulf Maritime Association
New Orleans Steamship Association
Baton Rouge Steamship Association
Pensacola Steamship Association
Tampa Maritime Association
Southeast Florida Employers Port Association
Jacksonville Maritime Association
Savannah Maritime Association
South Carolina Stevedores Association

STATEMENT OF INTEREST

The geographical focus of this case is on the Port of Mobile, Alabama where the litigation now before the Court began. But, the activities of Petitioners' which gave

rise to that litigation were not confined to that port. (Petitioner's Brief p. 2-4, *Windward Shipping (London), Ltd., et al v. American Radio Association, AFL-CIO, et al,* ___U.S.____, 39 L.Ed.2d 195, 1974). If Petitioners emerge from this case with a holding that those activities were and are protected from Congressional and Judicial restraint by the Federal Constitution, the practical effect will be to subject the economically feasible use of any United States port by a vessel flying the flag of another nation to the leave and consent of the Petitioner Unions.

Along the Atlantic shore from Cape Hatteras southward to Port Everglades and Miami and on the coast of the Gulf of Mexico from Tampa to the Rio Grande lie some of the nation's greatest ports. These *amici* are associations of virtually all owners, agents and stevedoring contractors operating in those ports. Included are Charleston, Savannah, Jacksonville, Miami, Port Everglades, Tampa, Pensacola, Baton Rouge, New Orleans, Lake Charles, Beaumont, Port Arthur, Orange, Houston, Galveston, Freeport, Corpus Christi and Brownsville, Texas.

The West Gulf Maritime Association alone numbers over 75 members in the Ports of Texas and Lake Charles, Louisiana, including owners of both United States and foreign flag vessels, agents who represent both domestic and foreign owners and stevedores who contract to load and discharge vessels regardless of flag.

The New Orleans Steamship Association represents similar interests at that great port, while members in Baton Rouge, Pensacola, Tampa, Southeast Florida, Jacksonville, Savannah and South Carolina perform such functions at the ports their names indicate.[1]

1. Tonnage at these Atlantic and Gulf ports, foreign and domestic, amounted to approximately 32% of the total waterborne com-

It is to be noted that these associations represent virtually all of the owners, agents and stevedores in the ports indicated. Owning, representing and stevedoring, as they do, vessels, both foreign and domestic, the interests of the members diverge in many areas and they and their principals are in constant competition for maximum participation in water-borne foreign commerce but they are here united by a vital concern that such regulation as may be necessary with respect to that commerce will be prescribed solely by the branches of Government entrusted with the nation's trade and foreign policy and will not be delegated to the petitioning unions.

ARGUMENT

I.

Introduction

The last thing which a true friend of this Court ought to do is increase the number of times it must read and digest substantially the same thought or argument. Especially to be avoided by friends are those features of a case involving valid state or local considerations and procedures which local parties are far better able to present. The deep concern which these *amici* have in the issues here to be resolved may result in something short of complete adherence to these limiting tenets, but we will labor to achieve a maximum amount of forensic economy.

As we read their brief, Petitioners seek reversal based first, upon National Labor Relations Act (29 U.S.C. 152, 157, 158) preemption and, secondly, constitutional (Ar-

---

merce of the United States in the calendar year 1972, the last year for which such statistics are available. WATERBORNE COMMERCE OF THE UNITED STATES, CALENDAR YEAR 1972, Department of the Army, Corps of Engineers (1972).

ticle VI, First and Fourteenth Amendments) protection. Our argument will respond to those two contentions in the order presented by petitioners.

II.

NLRA Preemption

The question of National Labor Relations Act preemption was nurtured carefully through the Courts of the State of Texas by these Petitioners and submitted full-blown to this Court in *Windward Shipping, supra.* Faced with the resulting adverse decision in that case, Petitioners appear to have cast about here for a factual difference upon which to forge a legal distinction. Indeed, even a factual difference is singularly hard to find. In each case the identical unions, pursuant to the same general plan, utilizing the same sign wording, leaflets and instructions against virtually identically situated vessels,[2] conducted the same type of picketing with the identical practical, economic and operational results. The fact that the picketing in *Windward* occurred in Houston and in this case in Mobile, is of no help, so that about the only remaining difference lies in the identity of the Plaintiff seeking the injunction.[3]

---

2. Although relegating discussion to footnote No. 5 on Page 18 of their brief, Petitioners allude to a potential difference of treatment between vessels owned entirely or substantially by foreign nationals and those vessels of foreign registry which are owned directly or indirectly by United States Citizens or corporations. It does not appear that Petitioners contend that the record in the case at bar provides the basis for a determination here of the legal effect of any such difference and, in any event, we believe that such an effort, for the reasons set out in Respondent Mobile's brief, would lead to the conclusion that no different result should obtain.

3. Our argument is limited to Petitioner's preemption argument as applied to the Mobile Steamship Association, Inc. We do not examine the force or validity of the additional contention that Respondent Malone's entitlement to injunctive relief is also preempted.

In these circumstances it is not difficult to understand why petitioners would urge that *Windward* denied preemption because of the identity of the Plaintiff. But this Court did not hold that the National Labor Relations Board had no jurisdiction because a foreign ship owner sought to enjoin the union's activity. Rather, it held that the NLRB had no jurisdiction because that union activity did not affect commerce and therefore was not within the preemptive scope of the Act. This Court did not say in the first paragraph of its opinion in *Windward* that the question was whether the fact that the Plaintiff was a foreign shipowner prevented preemption. Rather it said in that paragraph that the question was whether the Defendant union's activities affected commerce within the meaning of the applicable sections of the National Labor Relations Act, 29 U.S.C., Sec. 152 (6) and (7) and it held that they did not. The Court traced the policies underlying *Benz* and the subsequent decisions to which it lead,[4] emphasizing the underlying reasons for not subjecting picketing activities such as those found here and in *Windward* to resolution by the National Labor Relations Board:

a. The need for clearly expressed Congressional intention before the Court intrudes willy-nilly into the complex of considerations affecting foreign trade;

b. The impropriety of the Board's inquiring into the internal discipline and order of foreign vessels;

c. The reluctance to attribute to Congress an intention to disrupt a comprehensive body of sea law through

---

4. *Benz v. Compania Naviera Hidalgo,* 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional, Etc.,* 372 U.S. 10 (1963); *Incres Steamship Co. v. International Maritime Workers Union,* 372 U.S. 24 (1963); *International Longshoremen's Local 1416 v. Ariadne Shipping Co.,* 397 U.S. 195 (1970).

the construction of an act unrelated to maritime commerce; and

d. The dilemma of foreign ship owners which would result from any attempt to mollify American pickets by raising their seamens' wages, boycotting American ports, or fostering retaliatory actions against American vessels in foreign ports.

Not a single one of these serious considerations upon which *Windward* and the cases it cites are rested is diminished or changed one iota by the fact that the Association is seeking injunctive relief to avoid the damage done to its members by Petitioners' activity, whether those members be foreign ship owners, the agents of foreign ship owners or the stevedores who have contracted to load or discharge foreign flag vesels. If the activity does not affect commerce, the jurisdiction of the State Court is not preempted and any party who has sufficient legal standing to invoke the injunctive power of the Court and can show himself entitled to relief under established principles of equity, should be entitled to receive it.

Finally, it should be noted that the makeup of associations such as these *amici* demonstrates the multiple interests which must combine in the furtherance of meaningful water-borne commerce. The assertion that Petitioner's activity is not "in commerce" if brought to the Court by one party which it is injuring, but is "in commerce" if brought into the same Court by another injured party, having equal judicial standing and equitable entitlements to injunctive relief, requires a conceptual and abstract approach far removed from the concrete, practical treatment given by this Court to the real and important problems which have arisen in this area.

III.

Constitutional Protection

A reading of the briefs of the parties leaves us with the conviction that there is no real difficulty in settling upon the applicable constitutional principles. While picketing may indeed involve "expressive conduct within the protection of the First Amendment" (*Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 99, 1972) even Petitioners recognize that such involvement does not render all state regulation of picketing constitutionally impermissible. It also seems to be recognized common ground that state regulation may properly extend to the prohibition of picketing which seeks the violation of a State's valid public policy or law. So, the constitutional argument appears to narrow quickly to the existence of a valid public policy or law which the Courts of Alabama were protecting by issuing the injunction. A corollary question is whether, assuming the existence of such a valid public policy or law, it can be said that the Supreme Court of Alabama sufficiently identified and enunciated it.

Respondents lucidly and forcefully catalogue the State policies which support, if not compel, the action of its Courts. Although those laws and policies, while local in the legal sense, are of pervading validity, we adopt the description of them offered by Alabama Counsel for Respondents and resist the temptation to indulge in repetitious paraphrasing.

For some reason, Petitioners repeatedly deride the concept that the order of a duly constituted Court may be presumed on appeal to have been based upon valid grounds. The statement to this general effect by the Alabama Supreme Court, in our view, is nothing more than the expression of a principle which should govern the initial approach of any reviewing court.

Such a presumption gains strength in virtually every jurisdiction as a tenet to be followed in the review of the decisions of trial courts granting or denying temporary injunctive relief. *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, D.C. Cir. 1970, 429 F.2d 206; Wright and Miller FEDERAL PRACTICE AND PROCEDURE, Vol. 11, Sec. 2962.

The practical reasons underlying the teaching of the authorities cited are multiple. First the appellate court should and does bear in mind that an order giving or denying temporary injunctive relief need not serve as a permanent resolution of all substantive issues dividing the parties. In addition, the Court from whom temporary injunctive relief is sought must act without a full and complete exposition of all possible facts and arguments which are available to the litigants. In truth, the Court cannot avoid acting because either of its alternatives—withholding or granting the relief—will affect the immediate interests of the parties. Therefore, the Court must strike a balance and it is Hornbook law that its discretion in doing this will not be lightly disturbed. Finally, in many instances the Court may not at this stage of the proceedings give a full, clear and complete expression of all of the policy considerations underlying its Order.

For these reasons, we regard as sound the comment of the Supreme Court of Alabama evidencing a belief that had the trial court not felt that a substantial law or public policy of that state was in jeopardy, the injunction would not have been granted. As the Respondents point out, upon a full hearing of the application for permanent injunction, the Courts below will have an opportunity to document and express more fully the considerations which necessitate any continuance of injunctive relief. Reaching the federal constitutional question at this stage of the

proceedings and utilizing it to void the decision below would be in conflict with this Court's traditional approach to this most serious task.

We conclude with a reference to Petitioners' attempt to state the conflict in terms of the union's right of free speech as opposed to the Respondents' property rights. The abstract philosophical appeal of this approach is apparent but it is nonetheless just that—abstract. In truth and fact, the controversy involves nothing more than an attempted exaltation of Petitioners' "property rights and their preservation" (p. 22, Petitioners' Brief) against the desire of Respondents to retain those property rights which they have. Petitioners went to great pains to regulate and minimize idea communication by its pickets and to prohibit absolutely their speech. It was not their wish to be able to verbalize their grievances. The plan, as candidly and honestly stated by the only witness offered by Petitioners (whose credibility, status and "authority" to speak is now impugned by them) was to enlist economic pressure in an effort to channel economic benefits to themselves. The motives and purposes of their conduct were quite clear and understandable, i.e., the obtaining of more "business" for American seamen. The method they selected, however, was contrary to the public law and policy of the State of Alabama and the Federal Constitution does not afford them the right to its continued use.

CONCLUSION

The judgment of the Supreme Court of Alabama should be affirmed.

Dated: August 8, 1974.

Respectfully submitted,

Bryan F. Williams Jr

BRYAN F. WILLIAMS, JR.

Counsel for:

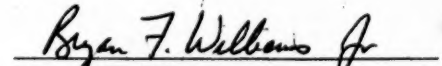
West Gulf Maritime Association
New Orleans Steamship Association
Baton Rouge Steamship Association
Pensacola Steamship Association
Tampa Maritime Association
Southeast Florida Employers Port Association
Jacksonville Maritime Association
Savannah Maritime Association
South Carolina Stevedores Association,

As Amici Curiae
205 Cotton Exchange Building
Galveston, Texas 77550

CERTIFICATE OF SERVICE

I certify that on this 8th day of August, 1974, three copies of the within Brief *amici curiae* were mailed, postage prepaid to the counsel for the parties listed below.

I further certify that all parties required to be served have been served.



BRYAN F. WILLIAMS, JR.

Counsel for:

West Gulf Maritime Association
New Orleans Steamship Association
Baton Rouge Steamship Association
Pensacola Steamship Association
Tampa Maritime Association
Southeast Florida Employers Port Association
Jacksonville Maritime Association
Savannah Maritime Association
South Carolina Stevedores Association,

As Amici Curiae
205 Cotton Exchange Building
Galveston, Texas 77550

Counsel for Petitioners:

Howard Schulman, Esquire
Schulman, Abarbanel & Schlesinger
350 5th Avenue
New York, New York 10001

Counsel for Respondents:

Frank B. McRight, Esquire
Armbrecht, Jackson & DeMouy
P. O. Box 290
Mobile, Alabama 36601

Alexander F. Lankford, III, Esquire
Hand, Arendall, Bedsole, Greaves & Johnson
30th Floor, First National Bank Building
Mobile, Alabama 36602